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Bar-Levy v 35-33 36th St. Corp.
2017 NY Slip Op 51218(U)
Decided on August 16, 2017
Supreme Court, Queens County
Butler, J.
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Decided on August 16, 2017

Supreme Court, Queens County

Natalie Bar-Levy, Plaintiff,

against

35-33 36th Street Corp., 35-33 36TH STREET CORP. d/b/a STUDIO SQUARE, Defendants.

24547/2012

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Denis J. Butler, J.

The following papers numbered 1 to 17 were read on Plaintiff's motion for an order restoring the case to the calendar and modifying that part of the order of the Hon. Martin E. Ritholtz filed December 8, 2016, that set aside as excessive the jury's award of $2,000,000.00 for [*2]future pain and suffering damages in favor of Bar-Ley without ordering a new trial on the issue of future pain and suffering damage unless plaintiff

stipulated to accepting a sum certain as determined by the Court as being reasonable compensation for such future pain and suffering; and on Defendants' cross-motion for an order modifying the Court's December 8, 2016 order reducing the improper, excessive 4 million jury herein to 1 million, by further reducing said verdict to a reasonable sum, and/or dismissing the complaint.

Papers/Numbered

Notice of Motion, Affirmation, Affidavit, Exhibits 1-9

Notice of Cross-Motion, Affirmation, Affidavit

and Exhibit 10-13

Affirmation In Opposition, Affidavit, Exhibits 14-17

Both Plaintiff and Defendants in the above-captioned matter seek to reargue, pursuant to CPLR § 2221(a), the Post-Trial Decision of the Hon. Martin E. Ritholtz filed December 8, 2016, which set aside as excessive a portion of the jury's $4 million award in Plaintiff's favor.

Neither motion challenges the portion of Hon. Ritholtz's decision that deleted the jury's award of $1,000,000 for punitive damages.

Plaintiff seeks reargument of the portion of Judge Ritholtz's December 8, 2016 decision that set aside the jury's $2,000,000 award for future pain and suffering, solely to the extent that the decision failed to state a specific award for future pain and suffering,

and failed to offer the Plaintiff the option of either accepting the decreased amount or conducting a new damages trial.

Defendants cross-motion for reargument seeks to modify Judge Ritholtz's December 8, 2016 decision to the extent that the Court did not set side the jury's verdict as to liability, and did not set aside the jury's award of $1,000,000 for past pain and suffering.

Upon the unavailability of the Hon. Ritholtz due to retirement, the matter was recently administratively reassigned to the undersigned. Pursuant to this Court's order dated August 9, 2017, oral argument was held on the instant motions on August 10, 2017, and adjourned at counsels' request to August 16, 2017. Upon the foregoing papers, and upon the oral argument held, it is ordered that Plaintiff's motion and Defendants' cross-motion are determined as follows:

"A motion for leave to reargue pursuant to CPLR § 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992].)

Defendants' cross-motion for reargument is DENIED. Defendants seeks to relitigate the same issues presented to Judge Ritholtz on Defendants' prior motion to set aside the jury verdict and jury awards. A motion for reargument "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented." (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999].) Defendants have failed to articulate any manner in which the Court misapprehended the law or facts in declining to set aside the jury verdict, or in declining to set aside the jury's $1,000,000 award for past pain and suffering.

Plaintiff, however, in support of her motion to reargue, quotes the controlling case law of this jurisdiction, which states that where, as here, a trial court sets aside a portion of a jury award [*3]as excessive, the "proper procedure" is to make a finding as to a reasonable award and "to order a new trial on damages unless the plaintiff stipulates to

the decreased amount." (*Bock v City of Mount Vernon*, 123 AD3d 644 [2d Dept 2014].) The Plaintiff proposes $475,000 over 5 years as a reasonable award for her future pain and suffering.

The Court finds merit in Plaintiff's legal argument. The Court therefore GRANTS Plaintiff's motion to reargue, and upon reargument, modifies the December 8, 2016 decision of this Court (Ritholtz, J.) decision *solely as follows*:

The Court adheres to the portion of the December 8, 2016 (Ritholtz, J.) setting aside the award of future pain and suffering award as excessive. As the undersigned did not preside over the trial in this matter, the Court has carefully reviewed the transcript of testimony adduced at trial, and the jury verdict sheet, in order to determine a reasonable award.

The Court finds an award of $250,000 over five years for future pain and suffering to be reasonable. The jury verdict sheet reflects that the jury's award of $2,000,000 was intended to provide compensation for a period of "50(+) years." The Court notes that the Plaintiff was in her mid-twenties at the time of the incident that gave rise to this litigation. Plaintiff's treating surgeon, Joel Friedman DDS, testified that Plaintiff was at increased risk of losing every tooth in her upper jaw over time, due to fractures she sustained in the incident. With respect to four specific teeth in her upper jaw that sustained trauma, Dr. Friedman testified that Plaintiff has a fifty percent chance of losing those teeth. In such instance, Plaintiff would require a bone graft and four dental implants, at a total estimated cost of $30,000.

It is hereby ORDERED, that Defendant's motion for a new trial on the issue of damages for future pain and suffering is granted, unless the Plaintiff stipulates to an award of damages for future pain and suffering in the amount of $250,000.

It is further ORDERED, that the above entitled action be and the same is hereby set down for a new trial by jury on the issue of damages for future pain and suffering only and that the calendar clerk of this court is hereby directed to place the above entitled action upon the trial calendar.

All other requested relief not addressed herein is DENIED.

This constitutes the decision and order of the Court.

Dated: August 16, 2017

Denis J. Butler, J.S.C.

Return to Decision List